IN THE

Supreme Court of the United States

October Term, 1970

No. 70-5138

PAUL PARHAM and ELLEN PARHAM et al.,
Appellants

v.

SEARS, ROEBUCK and CO. et al., *Appellee*

PETITION FOR REHEARING

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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Because of the close division of the seven justices as to the constitutionality of an ancient and widely accepted type of procedure, the effect this decision may have upon the credit and commercial systems of the nation, and the fact that the majority opinion indicates a serious misunderstanding of Pennsylvania procedures and the true status of the two Pennsylvania cases on appeal, it is respectfully requested that the Court seriously consider rehearing this entire matter.

The Court misunderstood the law of Pennsylvania and the status of the cases before it in that it says:

1. On Page 9 of its opinion: "The party seeking the writ is not obliged to institute a court action for repossession", citing Pennsylvania Rule of Civil Procedure 1073.

Actually no writ of any sort can be issued in Pennsylvania except by a duly constituted court in which an action has been instituted. Rule 1073 specifically states:

"(a) An *action* of Replevin with Bond shall be commenced by filing with the Prothonotary a praecipe for a writ of Replevin with bond, together with. . . ." All actions in Pennsylvania *can be started* either by *filing a praecipe for a writ*, a complaint or an agreement for an amicable action (See Rule 1007 Pennsylvania Rules of Civil Procedure which is the rule for assumpsit actions and general contract actions, Rule 1041 governing trespass or tort actions, and 1071, 1073 governing Replevin, [12 Purdon's Penna. Statutes Annotated—Rules of Civil Procedure] all of which so provide).

Pennsylvania retains the ancient common law procedure of starting actions with writs and this is exactly what was done in the instant cases (see P. 96 of the record for the lower court's opinion explaining this, the copies of the various papers filed in Common Pleas Court of Philadelphia County (Exhibits H and I on pp. 77 *et seq.*, of Record), the Pennsylvania trial court of general jurisdiction, wherein these actions were commenced and are still pending, all of the said papers (including the praecipe, the writ, the affidavit and the bond) clearly bearing the term, number and name of the Common Pleas Court Action; e.g., Court of Common Pleas of Philadelphia County, *Sept. Term 1970, No. 737.* See also Holmes, "The Common Law" (1881) (1901), where he states on Page 274, "After the Norman Conquest all ordinary actions were begun by a writ. . . . These writs were issued as a matter of course in the various well-known actions from which they took their names."

See also the stipulation of counsel on Page 69 of the Record, Paragraph 10, stating that Replevin with Bond is an *Action*, and Paragraph 13 indicating the numerous rights of the defendant and procedures available to the defendant in that very action.

2. The statement of the Court on Page 10 of its opinion that "If the party who loses property through Replevin seizure is to get even a post seizure hearing, he must initiate a law suit himself." This is simply not so as is clearly explained in Paragraph 13 of the Stipulation of

Counsel on Page 69 of the Record where the procedures open to the defendant in the Replevin Action pending in these cases are clearly set forth. A defendant in a Replevin action cannot in Pennsylvania nor in most states institute a replevin action against property in custodia legis. His remedy is to move or plead in the pending action to dispute the Plaintiff's right to possession, and he may do so by a number of means available to him in the state court action pending against him: Pennsylvania Rules of Civil Procedure 1076, 1078, 1079, 1080, 1082, 1084, 1085.

3. The statement on Pages 9 and 10 that the party initiating Replevin "need not even formally allege that he is lawfully entitled to the property" fails to consider the fact that the plaintiff itself or through its duly authorized agent with notarized power of attorney attached must execute and file a bond, as was done in this case, in which it averred under seal that the condition of the bond was such that if it failed to maintain its right of possession of the property it shall pay to the parties entitled the value of the property, all legal costs, fees and damages sustained by reason of the issuance of the said writ of replevin. Rule 1084 Pa. R.C.P. provides clearly for entry of damages against a plaintiff instituting the action improvidently either before or after trial. (12 P.S. Rules CP 77.) The Supreme Court of Pennsylvania held in *Herdic v. Young, 55 Pa. 176, 177* (1867) that "where a writ of replevin is sued out fraudulently and without color of right, a jury would be warranted in giving even exemplary damages. . . ."

The use of a bond in this manner with a statement of what happens if a plaintiff does not sustain his rights is a long established method of pleading in many types of proceedings including the guarantees of trustees, executors, appeals and supersedeas, etc. This is a clear verification under seal of the plaintiff's claim of possession. Further, of course, the entire action can only be instituted for possession or under a claim of possession so that the filing of the praecipe in itself establishes that the claim is one to possession.

4. The statement on Page 8 that ". . . a prothonotary rather than a court clerk issues the writ" adds to the confusion since the word Prothonotary means the Court Clerk, and the Prothonotary is the Court Clerk of the Court of Common Pleas in Pennsylvania. Black's Law Dictionary, 3rd Edition, Page 1453: "Prothonotary: 'Title given to an officer who officiates as principal clerk of some courts.'; *Whitney v. Hopkins*, 135 Pa. 246, 19 A 1075." Even the Clerk of the Pennsylvania Supreme Court is so designated.

5. The Court's statement on Page 11 that the ancient common law required an action in detinue rather than Replevin to regain goods rightfully taken but wrongfully detained would appear to be of little weight when the Supreme Court itself speaking through Chief Justice Marshall in the case of *Slocum v. Mayberry*, 2 Wheat 1, 4 L.Ed. 169 (Vol. II, Page 1) (1817) sustained the Courts of Rhode Island in upholding a summary writ of Replevin issued by Rhode Island on behalf of a private party against a revenue agent of the United States acting on behalf of the United States. In that case, the seizure of the vessel *and the cargo* was proper, but the retention of the cargo was improper. In emphasizing the importance of the summary remedy even against the sovereign itself, the Chief Justice stated on Page 8, " . . . it would have been a wanton oppression to expose them to loss by a continued deterioration. . . ."

As the Supreme Court then indicated, Replevin in American practice was at a very early date extended to goods either wrongfully taken or wrongfully detained.

The text cited by the Court on Page 11 of its opinion to support its statement that a creditor at common law had to invoke detinue in cases where there was an improper detention without a wrongful taking makes it quite clear that this was not true in American common law practice because "in America, it (Replevin) was frequently used instead of detinue." (Page 368, 369, Plucknett—"A Concise History of the Common Law.")

Even in the English Practice, however, the authoritative practice text used for over a century in numerous

editions indicates that there is grave doubt that detinue instead of Replevin was required. Page 811, Chitty General Practice, Volume I, (Edition 1834) reads as follows:

"Replevin is not (as until recently had been generally but erroneously supposed, 3 Blackstone Commentaries 146) confined to cases of wrongful distress, but is an immediate summary remedy in all cases where there has been a wrongful taking, even by force or in any manner otherwise than by process in execution; and it should seem that even goods *illegally detained* may be replevied."

In support of the use of Replevin for goods merely wrongfully detained, it cites a number of ancient authorities. "Ex parte Chamberlain 1 Schol. and Lef. 320; *Shannon v. Shannon* Id. 324; *Le Mason v. Dixon Sir W. Jones*, 173, 174; Years Books 6 Hen 7, 8, 9, *Bishop v. Viscountess Montague*, Cro. Eliz. 824."

6. The theory enunciated by the Court on Page 10 of its opinion that common law Replevin actions bear little resemblance to modern Replevin actions and that Replevin was used only for specific goods "wrongfully distrained" is denied by the very text on which the Court relies: Holdsworth, "History of English Law" (1927), which states in Note 9 on Page 285 of Volume 3:

"Even Blackstone seems to have thought it only lay for a distrainee, but as Ames points out (H.L.R. X 1375) there is a clear case against this view in 1608, Godholt, P. 1, 195, cp. Comyn digest, Replevin A; Gilbert Distress (4th Ed.) 80; 1 Co. Rep. 54A, note where it is said: 'a replevin is a remedy which lies to recover damages for an immediate wrong without force, in taking and detaining cattle and goods, whether by distress for rent, damage feasant, etc., or *otherwise*."

See also 12 Edward II Case No. 10 (decided in 1319) (reprinted Selden Society Publications Vol. 81, Page 75 [1964]). The court upheld the writ of replevin where the defendant had lawfully taken possession of trespassing cattle but was wrongfully retaining them; also 11 Edward II, Pages 48, 50 (1317) Selden Society Publications Vol.

61 and Case 122 on Page 121 of Selden Society Publications Volume 60, the said case being decided in 1253 during the reign of Henry III.

The Registers of Writs of the Court Clerks of England indicate that the writs of replevin as issued in ancient days commanded the Sheriff to seize all types of personal property and were not limited to property distrained. The registers also indicate that the Sheriff was commanded to seize the property prior to hearing and hearings were not called for until and unless the defendant made a claim of property in the goods which had been replevied. See Registers of Writs, as published by the Selden Society, 1970, Vol. 87, particularly Writs CC 85, CC 86, CC 87 (Page 59); CA 21 (Page 24). These writs date from the 13th and 14th Centuries.

It would thus appear that contrary to the Court's reading of history and in accordance with the very authorities it cites, the definition of due process at ancient common law both in England and its North American Colonies, and due process in the United States as recognized by the authorities and courts at the time the Constitution was adopted and the Fourteenth Amendment enacted included the type of proceeding which the Court has now declared unconstitutional. The historical grounds on which the Court partially based its decision would therefore appear not to sustain that decision.

Therefore, your petitioner respectfully suggests that the Court may wish to reconsider its decision on this important constitutional question based on what your petitioner believes is a misunderstanding of the cases before the court, the law applicable thereto, and the relevant history of the common law and of due process.

Respectfully submitted,

ROBERT F. MAXWELL

CERTIFICATE

I, as attorney for Sears, Roebuck and Co., petitioner, do hereby certify that this Petition for Rehearing is interposed in good faith for the reasons stated therein and not for purposes of delay.

ROBERT F. MAXWELL